Supreme Court, U.S.
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No. 01-868

IN THE

Supreme Court of the United States

THERESA B. BRADLEY,

Petitioner,

v.

ADAM STEPHEN DONER and DAVIS, GORDON, DONER & CHANDLER, P.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF IN OPPOSITION

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The following abbreviations will be used in this brief:

(R.__) record on appeal

(I.B.__) appellant's initial brief

(A.__) appendix to the answer brief

(App. __) appendix to the petition

REASONS FOR DENYING THE WRIT

I. The State Courts in Florida correctly applied state law on the issue of what elements were required to establish litigational legal malpractice.

A. Background:

Petitioner seeks to have this court review a decision of the intermediate appellate court in Florida which affirmed a Final Summary Judgment entered in favor of Respondents in a legal malpractice case (R. 351-56). Petitioner alleged in her Third Amended Complaint that Respondents, attorneys that represented her at different times during her prosecution of an arbitration case against Dean Witter and various brokers, committed legal malpractice (R. 135-145). She alleged that the result of the alleged malpractice was that her arbitration claim against Dean Witter was dismissed with prejudice (R. 135-45). Petitioner alleged that she had instituted her proceeding for binding arbitration against Dean Witter in October 1994 (R. 135-45). Petitioner alleged that she retained Attorney Scott Warfman to represent her in the action in October of 1996 (R. 135-145)[1]. She alleged that Attorney Warfman withdrew from the case on June 2, 1997 (R. 135-45). Petitioner alleged that she then retained Respondent, Attorney Adam Stephen Doner, on September 10, 1997 (R. 135-45). Petitioner acknowledged in the Complaint that Adam Stephen Doner withdrew from the case less than two weeks later, on September 23, 1997 (R. 135-45). She then alleges that she retained co-Respondent John William Carroll in November 1997 (R. 135-45).

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1. Mr. Warfman was originally a defendant in this case along with Respondents. However, Mr. Warfman was no longer a party to the action at the time of the motions for summary judgment.

The allegations against the attorneys were that they failed to advise Petitioner of, and respond to, Dean Witter's requests for discovery (R. 135-45). Finally, Petitioner alleged that the result of the alleged malpractice was that her arbitration proceeding was dismissed with prejudice (R. 135-45).

Discovery revealed that there were disputed issues of fact regarding whether Petitioner cooperated with her attorneys regarding the production of her 1997 and 1998 tax returns which she felt were irrelevant to the arbitration proceeding. However, discovery also revealed that the undisputed expert evidence established that the arbitration panel had exceeded its authority by dismissing Petitioner's case with prejudice without first attempting to secure compliance with the discovery requests through lesser sanctions (R. 440-46).

It was undisputed before the trial court that Dean Witter had filed two separate motions to dismiss the arbitration proceeding (I.B. 4). On September 12, 1997, Dean Witter moved to dismiss the proceeding pursuant to NASD Code of Arbitration Procedure Section 10319(c) (I.B. 4). This section permits the arbitration panel to dismiss the proceeding upon the third request for postponement. However, dismissal pursuant to this section must be without prejudice. Later, on November 11, 1997, Dean Witter moved to dismiss the arbitration proceeding pursuant to NASD code section 10305(b)(I.B. 4). This code section permits the arbitration panel to dismiss a proceeding based on failure to comply with discovery.

The arbitration panel initially dismissed Petitioner's case on January 7, 1998 (A. 1). It was not clear from that order what the basis for dismissal was. Petitioner appealed the order

dismissing her case to the Circuit Court of the Seventeenth Judicial Circuit (A. 2). Subsequent to filing her appeal to the Seventeenth Judicial Circuit, but before obtaining a ruling, Petitioner filed this lawsuit in the Fifteenth Judicial Circuit for legal malpractice on December 15, 1998 (R. 1-14). After this lawsuit was filed, the Seventeenth Judicial Circuit entered an order of remand, sending the arbitration proceeding back to the arbitration panel with instruction for them to clarify the basis upon which they dismissed the proceeding with prejudice (A. 2). Petitioner sent a letter to the Arbitration panel wherein she argued that dismissal with prejudice pursuant to Rule 10305 would be erroneous (A. 1). Nevertheless, the arbitration panel, pursuant to the order of remand, entered an "Amended Award" clarifying that the dismissal with prejudice was entered pursuant to Code of Arbitration Rule 10305(b)(A.5).

Petitioner, while simultaneously pursuing this legal malpractice case, appealed the Amended Dismissal of her arbitration case to the Seventeenth Judicial Circuit. In July, 1999, while that appeal was pending, a hearing was held in this case on Defendant's motions to dismiss the legal malpractice case. One of the points argued was that the case was not ripe because Petitioner's appeal of the arbitration panel's order of dismissal was still pending (A. 3, p.5). On July 20, 1999, Petitioner, Ms. Bradley, filed a motion in the Seventeenth Circuit Appeal to stay the proceedings or in the alternative, to take a voluntary dismissal of the appeal (R. 146-172). In the motion, Petitioner acknowledged that she was making a decision to pursue a legal malpractice claim rather than the appeal, stating:

> Plaintiff is informing the Court that she has proceeded with a Professional Negligence and

> Legal Malpractice action against Plaintiff's legal counsel which is Palm Beach County Civil Circuit Court. As the initiation of the Professional Negligence Case contains four causes of action including compensatory damages that Plaintiff would have collected against Dean Witter, compensatory damages component may essentially preclude furtherance of her meritorious appeal pending before this Court in Broward County against Dean Witter/Evansen/Schectman. However, the confusion over which award 10319c without charges or 10305 with charges remains for further judicial review.

(R. 146-172). The Seventeenth Circuit dismissed the appeal pursuant to Petitioner's voluntary dismissal.

As the legal malpractice case proceeded, Respondent retained Michael R. Casey, a legal expert in the area of securities arbitration and related appeals. Mr. Casey executed an affidavit establishing his credentials as an expert in the area of securities arbitration and related appeals (R. 354). Mr. Casey stated further that he had reviewed the pertinent pleadings from the arbitration proceeding (R. 354). Finally, Mr. Casey stated his opinion that Petitioner had abandoned a meritorious appeal, stating:

> Based on the foregoing documents and on the pertinent provisions of the NASD Code of Arbitration Procedure, the United States Arbitration Act and controlling case law authority, it is my expert opinion that the Amended Award dated February 25, 1999 in the NASD Arbitration contains sufficient quasi-judicial error such that,

> in all likelihood, it would have been vacated in the Arbitration Appeal Case had the Plaintiff therein chosen to pursue such relief in that case.

R. 440-46)

Mr. Casey also stated in his affidavit that his review of the arbitration case revealed that prior to the dismissal with prejudice the arbitration panel had not imposed any lesser sanctions on Petitioner in an effort to enforce compliance with the discovery requests which were the basis of the motion to dismiss (R. 440-46). Mr. Casey pointed out that Rule 10305(b), the rule under which Petitioner's arbitration case was dismissed, explicitly states that dismissal with prejudice can occur only if lesser sanctions have been imposed and have "proven ineffective" (R. 440-46). Co-Respondents, John Carroll, *et al.*, also obtained an affidavit from a securities expert stating that it was likely the dismissal of Petitioner's arbitration proceeding would have been reversed on appeal.

Armed with this undisputed expert testimony, Respondents each filed a motion for summary judgment based on the principle that a plaintiff cannot pursue a legal malpractice claim if the result of the alleged legal malpractice was judicial error which would likely have been corrected on appeal (A. 4). Petitioner did not file any evidence contradicting the opinion of Respondents' expert. Petitioner did not file any evidence establishing that the arbitration panel had ever imposed lesser sanctions for the discovery violations which ultimately led to the dismissal with prejudice. Petitioner took the position that the dismissal with prejudice was not an example of the arbitration panel exceeding its authority, because she had in fact failed to respond to the

discovery requests. Petitioner did not argue in any of these three responses that the arbitration panel had previously attempted to secure compliance with discovery by imposing lesser sanctions.

A hearing was held on the motions for summary judgment (R. 402-435). At the hearing, Petitioner did not submit any expert opinions contradicting Respondents' expert opinion. Petitioner did not submit any evidence suggesting that any lesser sanctions had ever been imposed by the arbitration panel before her proceeding had been dismissed with prejudice. Rather, Petitioner argued at the hearing that she believed that the failure to respond to discovery motions justified the arbitration panel's decision to dismiss with prejudice. Petitioner concluded further that there were only five basis for appealing a ruling of the NASD arbitrators "which are like fraud of the arbitrators" and Petitioner did not believe the arbitrators in her case were acting fraudulently (R. 426). However, Petitioner conceded that she was not a securities expert (R. 427), and not a lawyer (R. 432). In any event, Petitioner was not sworn in, did not testify, and did not execute or admit an affidavit.

Following the hearing, the trial judge drafted a detailed order granting the motions for summary judgment. (App. 1) Petitioner appealed that judgment to the Fourth District Court of Appeal. The Fourth District Court of Appeal affirmed the judgment based on the well-established Florida law regarding the elements of a claim for legal malpractice. (App. 8-10) Petitioner sought review before the Florida Supreme Court. The Florida Supreme Court granted petitioner numerous extensions to file a brief that complied with the applicable appellate rules. Finally, after petitioner missed each

successive deadline, the Florida Supreme Court dismissed her petition for review based on her failure to timely file a brief that complied with the rules. (App. 11)

B. The trial and appellate court correctly applied the law:

It is well established under Florida law that where a party's loss results from judicial error occasioned by the attorney's curable, nonprejudicial mistake in the conduct of the litigation, and the error would most likely have been corrected on appeal, the cause of action for legal malpractice is abandoned if a final appellate decision is not obtained. *Segall v. Segall*, 632 So. 2d 76, 78 (Fla. 3d DCA 1993). When the defendant in a legal malpractice case introduces undisputed evidence that the plaintiff has frustrated the appeal of the underlying order and thus waived the claim for legal malpractice, the defendant is entitled to a summary judgment. *Id.* Here, the undisputed evidence established that Petitioner voluntarily dismissed her appeal of the order dismissing her arbitration case with prejudice. The undisputed evidence also established that if Petitioner had pursued her appeal, in all likelihood, there would have been a reversal of the dismissal with prejudice. Accordingly, the trial court correctly held that Petitioner abandoned her claim for legal malpractice and Respondents were entitled to summary judgment and the Fourth District Court of Appeal correctly affirmed that judgment.

Florida law is absolutely clear that Petitioner is precluded from raising an issue for the first time on appeal from a summary judgment. *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981). Petitioner never argued to the trial court, in writing or at the hearing, that she had no valid appeal because

lesser sanctions for the discovery violations had been imposed against her before the arbitration panel ultimately dismissed her case. Furthermore, Petitioner did not introduce any evidence, either documentary or testimonial, establishing that lesser sanctions had previously been imposed for the discovery violations which led to the dismissal, or that it was more likely than not that she would not have prevailed on her appeal.

Finally, the June 16, 1997 order which Petitioner now refers to as the "lesser sanction" was in actuality not a sanction, but rather an order compelling discovery.

The cases relied on by Petitioner to support her argument that she did not need to pursue her appellate remedy did not involve litigational malpractice which resulted in judicial error which could be corrected on appeal. *See*, *Keramati v. Schackow*, 553 So. 2d 741 (Fla. 5th DCA 1989) (alleging negligent advice to settle case, no judicial error); *Bill Branch Chevrolet, Inc. v. Burnett, P.A.*, 555 So. 2d 455 (Fla. 2d DCA 1990) (alleging inadequate investigation of case, no judicial error); *Zitrin, M.D., P.A. v. Glaser*, 621 So. 2d 748 (Fla. 4th DCA 1993) (alleging negligent failure to include provision in employment contract, no judicial error).

The allegations in this case involve litigational malpractice and the undisputed evidence established that the resulting dismissal with prejudice was the result of judicial error which in all likelihood would have been corrected on appeal. Accordingly, the trial court correctly held that Petitioner abandoned her legal malpractice claim by failing to pursue her appeal of the order dismissing her arbitration proceeding and Respondents were therefore entitled to summary judgment.

II. Neither the record below nor the petition present a federal question that warrants review by this Court.

The rulings of the Florida courts do not raise the question presented in the first question for review asserted by Petitioner. The Florida courts did not hold that Petitioner was required to ignore the Federal Arbitration Act 9 U.S.C. §§ 1-14. The Florida courts merely applied the common law standard for recovery in a legal malpractice case and ruled that Respondents were entitled to summary judgment because the undisputed material facts established that Petitioner had failed to appeal the order dismissing her arbitration claim and that more likely than not the order would have been reversed if it had been appealed. Also, Petitioner states that the order required her to expend over $200,000 on an appellate attorney. There was no evidence before the trial court regarding how much Petitioner would be required to expend on an appellate attorney. On the contrary, the evidence before the trial court was that Petitioner was representing herself in her arbitration appeal.

Petitioner's second question presented for review is not clear and therefore is in violation of this Court's Rule 14(1)(a). As discussed above, Respondents were entitled to summary judgment based on the undisputed facts. The basis of the summary judgment was expert testimony which Petitioner did not object to before the trial court.

The third question Petitioner attempts to present does not warrant review by this court. The record clearly establishes that the ruling of the Fourth District Court of Appeal in no way denied Petitioner the due process of having her case reviewed by the Florida Supreme Court. Pursuant to the Florida Rules of Appellate Procedure, Petitioner was

entitled to seek review by the Florida Supreme Court. She sought review by the court, and indeed the court granted her numerous opportunities to file a brief that complied with the appellate rules. Petitioner failed to file a brief that complied with the rules and her case was dismissed for failure to timely file the brief. (App. 11)

The fourth question Petitioner attempts to present also does not warrant review by this Court. Petitioner has not presented any facts indicating that the State of Florida made or enforced any law treating her differently than any other citizen based on a facial classification, or that any law was applied in discriminatory manner. Indeed, the rulings of the Florida courts make it clear that all persons claiming legal malpractice based on litigational malpractice have the burden of establishing that they exhausted all appellate remedies that likely would have been successful.

The fifth question Petitioner attempts to present for review is not clear. As laid out above, the courts in Florida did not ignore the NASD Code of Arbitration Procedure.

The sixth question Petitioner attempts to present does not warrant review by this court. The courts in Florida did not ignore the common law of Florida while ruling in this case. Both the trial court and the Fourth District Court of Appeal cited the well established line of Florida cases holding that if a plaintiff alleging litigational malpractice did not pursue an appellate remedy which had a likelihood of correcting the error, they may not pursue a legal malpractice claim.

The seventh question petitioner attempts to present does not warrant review by this court. The rulings of the trial and

appellate court in this case make it clear that the courts were not modifying the Federal Arbitration Act by requiring an appeal of the ruling of the arbitration panel. The courts were merely applying the state common law of Florida which requires that viable appellate remedies must be exhausted before a litigant can pursue a malpractice claim against their lawyer based on litigational malpractice.

CONCLUSION

Petitioner has not presented a question which warrants review by this Court. The record clearly establishes that the trial and appellate court in Florida merely applied the well established state common law regarding litigational legal malpractice claims. The questions Petitioner attempts to present for review are not clear. Furthermore, the questions presented for review incorrectly assume that the Florida trial and appellate court rulings addressed issues which they did not address expressly or inherently. Finally, Petitioner's assertion that this case presents an equal protection or due process question is without merit. Petitioner asserts that there is an equal protection question, but she does not state any facts suggesting that she has been treated differently based on a classification or that the law in Florida regarding litigational malpractice was applied to her in a discriminatory manner. Petitioner asserts that her due process right to review by the Florida Supreme Court was hindered by the Fourth District Court of Appeal. However, the record clearly establishes that the sole reason the Florida Supreme Court dismissed Petitioner's case was her failure to timely file a brief which complied with Florida Rules of Appellate Procedure 9.210(a)(2). 9.210(b) and 9.210(d). For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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